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Svendsen, Idamarie Leth; Kronborg, Annette; Gyldenløve Jeppesen-De Boer, Christina

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# The private – public law divide

## Does this legal design create an abyss to children's welfare?


CHRISTINA GYLDENLØVE JEPPESEN-DE BOER, *researcher and teacher at Utrecht University, Molengraaff Institute for Private Law, The Netherlands*, ANNETTE KRONBORG, *associate Professor in Family Law at Center for Retskulturelle Studier, Copenhagen University, Denmark* & IDAMARIE LETH SVENDSEN, *Ph.D Fellow at Roskilde University, Denmark*

### ABSTRACT

In a Scandinavian perspective, the family and the individual have changed place during the 20th century. Today, the law takes its starting point in the individual – not in the family. A consequence of this development is that it no longer is legally possible to relate the good family to a particular societal institution. Marriage as an institution has been individualized and the goodness of the family has to relate to the well being of the individuals instead. This article shows that within this historical development the private-public law divide has not been seriously challenged. The inconsistencies stemming from it are demonstrated and it is shown how they imply a legal design more preoccupied with traditional divisions of power and positions than with an interest in the reality of the people it is aimed at. In the article it is argued from within the best interest principle that the historical development necessitates a re-thinking of the distinction between child welfare law and family law. It shows how the distinction is nationally and institutionally embedded. Further, that the distinction has only been superficially addressed by the CRC committee.

**Key words:** Private/public law distinction, child protection, child welfare, best interest of the child, national authorities, family, CRC, individualization.

## 1. Introduction

In this paper, we describe the development of new perceptions of parenthood, family and child welfare in family law and child welfare law with a view to the workings of  respective national authorities. The purpose is to discuss implications of the development for the relation between the two legal fields and authorities, and to ask to what degree the legal framework is coherent with changed perceptions. The article focuses on Danish law, but parallels will be drawn to Sweden and Norway to set up a Scandinavian context.

The starting point is a common situation of today: A child having problems, related to the parents' serious disagreements about the upbringing of the child, the typical situation being that the parents have separated or divorced. We see the situation as framed by two legally divided and different understandings; that of private law on the one hand and of public law on the other. Thus, the private-public law divide is generalized and used as an analytical tool in this paper, since it is a core feature of the legal systems of the Scandinavian countries even though the divide has been approached differently in each country, and although the general relevance and reality of this divide is disputed. It is still there. The private law understanding of the situation is covered by *family law*, dealing with questions of parental responsibility, residence and contact. In family law, a case is typically initiated by one of the parents, and the involvement of the authorities is defined by the parents' conflict. The competent authority addresses the issue of conflict between the parents, and there is no obligation to supervise whether a decision based on the best interests of the child continues to be so. This is different from the public law understanding of the situation – here it is covered by *child welfare law*. In child welfare law, the parents are not in control of the case as in family law. The public authorities are involved in the family as defined from a more holistic child welfare perspective. They are obliged to investigate the situation and to supervise the family if they make a decision in order to support the child's welfare.

Our approach is to first outline the general, international developments in the direction of individualization of the family that bear upon the respective legal fields, and on this background to describe current Danish family law and child welfare law, by drawing on the historical

development of law and authorities with a view to the private/public distinction. Then we review current law and its coherence, discuss the relevance of the distinction, and tentatively draw a Scandinavian parallel. Finally, we discuss the developments with a view to the Convention on the Rights of the Child (CRC), since the notion of »the best interests of the child« is a core value in both family law and welfare law.

Through this analysis, we find a number of inconsistencies and impracticalities related to the divide and leading to implications for families, children and authorities. Additionally, we find that these implications cannot reasonably be justified by considerations to uphold a traditional legal distinction but rather ought to lead to a more basic re-thinking of the two systems. Such a re-thinking necessarily would have to take seriously the changed perceptions and conditions of families, parenthood and children and to take a child and family oriented perspective. As such, re-thinking the legal regulation poses the question whether family and welfare law and authorities should be more—or completely—united? We will not answer this question, but confine ourselves to draw attention to the fact that it can and should be posed. Legal distinctions are not natural or self-evident. They can be changed.

## 2. The influence of the individualization of family

The Nordic family law reforms in the beginning of the 20<sup>th</sup> century represented society's legal adaptation to the industrialization and the new working and living patterns. Industrialization had in some respect produced dehumanizing working conditions which the family was to compensate for and had led to new family patterns of more wage earners. The understanding of the family, embedded in the reforms, was a nuclear family, framed by marriage with a housewife and a wage earner.<sup>1</sup> The housewife was meant to turn new knowledge into welfare, and to create a nice home, as well as to lift the family and society as a whole out of poverty. This was a new, modern sense of family and motherhood.<sup>2</sup> If the husband failed to earn enough money, the housewife was expected

1 Bentzon, V. (1920).

2 Schmidt, L.-H. and J. E. Kristensen (1986), chapter 6, Projekt husmoder.

to work outside the home since both spouses were obliged to support the family.<sup>3</sup> Although the reforms therefore led to new legal formats, such as joint custody, common maintenance obligations and the liberalization of divorce, the family was still considered a pre-existing entity; a central pillar of society, uniquely placed as the bearer of morals. Thus, marriage was still seen as the legal category of family; marriage was the societal institution understood as good, and therefore it was good that the spouses had joint custody and common obligations of maintenance. The liberalization of divorce was also partly framed as a matter of a higher degree of equality between spouses within this understanding.<sup>4</sup> In theory, the intimacy of family life still involved the need and naturalness of a high moral life, and it was not the aim of the reforms that the state<sup>5</sup> should regulate or individualize family life. The aim was only to regulate the *framework* of the family – parental authority, maintenance and tentatively limited contact. The framework corresponded to this understanding of marriage as the right and harmonious family as a pre-existing entity, and divorced or unmarried parents were delegated sole parental authority and thus legally not in conflict with the other parent. Thus, unmarried parents deviated from the ideal of marriage, and dissolution of marriage was understood as a change in the parents' societal status, entailing a necessity to reorganize the child's legal position to its parents.<sup>6</sup>

In reality, the reforms led to an increase of state intervention in civil society focusing on two issues which were crucial also on the public law agenda - maintenance and children in poor living conditions.<sup>7</sup> And in reality, the reforms implied moving from marriage as the legal framework of the family to state interest in the individual family member, be it the individual parent(s) or the child. One reason for this external,

3 See an analysis of the spouses equal obligations; Bersbo, Z (2010).

4 On the liberalization of divorce, see Kronborg, A and I. L. Svendsen (2012).

5 The term *state* is used in a broad sense including all public authorities such as courts, municipalities and state administration. The term *State Administration* refers specifically to the authority *Statsforvaltningen*.

6 In Danish law agreement or decision on custody was from 2001 no longer a condition for divorce.

7 On the connection between the family law reform and the development of the welfare state, see Melby, K. et.al. (2001).

individualizing effect on the family was that it became less necessary for the individual person to uphold a miserable marriage - and sometimes even irresponsible. Another reason was that the equality within the family unit over time made it difficult to uphold the traditional, different legal positions of men and women in public law such as regards the rights to citizenship, taxing benefits and differences in wages. This was increasingly seen as discrimination; as an infringement of individual rights.

The globalization and rise of the competitive state in the end of the century entailed further individualization of family and parenthood as well as an increase of state intervention in the family.<sup>8</sup> Today, the individual person has taken the family's place as the pre-existing unit of society. In this move same sex couples have been included in normality. Also divided parenthood with two homes of the child has been included together with single mothers given fertility treatment in public clinics. The individual, not the family, is the entity which the regulation is directed at. Family is an attribute of the person and part of his or her self-realization/creation as a parent or a partner.<sup>9</sup> Dissolving a marriage or a partnership is not seen as a break-down, but rather as a new beginning – as a possibility of entering into new relations with respect of the children's perspective.

The individual duties and rights in today's society can be understood on the background of this new position of family and individual. In a sense they have changed place. Today, the individual comes first – then the family. A consequence of this development is that it is no longer possible to relate the good family to a particular societal institution. Marriage as an institution has been individualized and the goodness of family has to be related to the individuals instead.<sup>10</sup>

Thus, the image of the child as a part of a family entity has been emulated by the image of the child as a bearer of rights,<sup>11</sup> including a right to

8 On state intervention in the family, see Egelund, T (1997) Bryderup, I (2005) og Ebsen, F. (2007).

9 See on the époque of self-creation; Schmidt, L.-H. (1999).

10 In Danish law there is almost no legal relationship between marriage and parenthood.

11 Mattsson, T. (2008), Warming, H, (2011) Gilbert, Parton and Skivenes (2011).

two parents, and it is considered in the best interests of the child if the parents reach a decision on the future of the child, if necessary guided by the authorities. This implies a move from an ideal of harmony and stability in the perception of family and parenthood to a perception of dynamics and conflict because the individual right-holders are the holders of harmony as well as conflicts and they are free to make choices, and they may not agree. As for the parents, caregiving to a larger extent therefore involves guidance from the state. As for the child, the development puts it in a more direct relation to the state since there is less family uncovered by the state to mediate parental conflict, allowing for the child to be continuously moved from one home to another. Thus, the child's right to two parents is not only a substitute for the former marriage with the inclusion of same sex couples and parents living apart. The individualization has further implications because the individual right-holders may be in conflict that can harm the child.<sup>12</sup>

In this way, the historical development has led to new contexts and perceptions of children, family and parenthood, one central change being the shift from an ideal of marriage and harmony to individual rights and child welfare. Due to this individualization, the families involved in the private and the public law system are generally and potentially the same. However, the divide between family law and welfare law is more or less upheld in its traditional form.

### 3. Family law authorities and procedures

Family law has adapted to the development by installing and emphasizing procedural regimes with two paths—one of agreement and one of decision-making. Thus, the development of an individualized perception of parenthood has involved a change in the interplay between procedural and substantive family law. The procedural regime has been developed with the ideal of co-operating parents. The Danish procedures concerning parental authority, residence or contact—separately or as a non-mandatory part of the divorce procedure—involve two types of authorities, the State Administration and the court system. The former

12 On conflict as normality; Raffnsøe, S. and O. K. Pedersen (1993).

takes the role of gate-keeper of access to the court system, the role of which has been gradually emasculated during the last decades with the aim of promoting parental co-operation and settlement.<sup>13</sup>

The parallel system was rearranged in a reform that came into force in 2007 which was part of a larger reform reducing the number of municipalities and re-arranging the regional level between state and municipality, by turning the former 14 counties, led by regional politicians, into 5 administrative regions.<sup>14</sup> The number of regional state administrations was also reduced from fifteen to five. Later, in 2013, the State Administration has been centralised to one administration with regional offices.<sup>15</sup> The main goal was to create larger units and reduce costs, increasing efficiency and expertise. The main feature of the reform in family law was to favour the administrative procedure above the court procedure. The two track system based on agreement (administrative procedure) and decision (court procedure), providing a choice for the parents, was abandoned in favour of the obligatory administrative entrance, designed to promote co-operation and settlement, reserving the court procedure for those unwilling or unable to fit the co-operation norm. In substantive law the main rule became joint custody and as a consequence residence as a legal concept was introduced. The residence parent is authorized to solely make decisions on »general daily care» (which according to the guidelines on contact includes the child's right to an assessment in contact cases), care-institutions, national relocation, school psychologist, child counselling.<sup>16</sup> The two track reform also implied a further development of the administrative procedural regime in respect of more differentiated procedures and separation of pedagogical efforts from legal decisions. The central supervision of the State Administration is carried out by use of contracts defining the yearly results of the State Administration which includes a minimum percent-

13 On this development, see Kronborg, A (2007).

14 *Lov nr. 499 af 6. juni 2007 Forældreansvarsloven* (Act on parental responsibility).

15 *Lov nr. 157 af 16. maj 2013 om ændring af lov om regional statsforvaltning, lov om børneførsørgelse, lov om ægteskabs indgåelse og opløsning og forskellige andre love som følge af ændret organisering af statsforvaltningerne.*

16 *Vejledning nr. 71 af 27.09 2012 om forældremyndighed og barnets bopæl* (Guidelines on parental authority and residence of the child) Section 2.3.1. and *Vejledning nr 9297 af 25.06.2013 om samvær* (Guidelines on contact) Section 21.3.2.



age of the number of cases in which the parties should reach a settlement.<sup>17</sup> The loss of an individual right to bring your own case to the court was implemented without any public debate of the consequences of this new perception of the family law authorities, and there has been no later debate of this part of the reform. The changes are adaptive and interdependent in relation to the changes in the perception of parenthood. As such their rational basis and values such as welfare efficiency, cooperation and broad target groups, not based on categories in reality resemble those of welfare law, cf. below.




The State Administration is regulated in The Act on Parental Responsibility and in general public administrative law. The case work of the State Administration is understood as private law concerning the legal framework of parenthood, i.e. the child's right to two parents. Thus, all cases with the State Administration are initiated by one of the parents, and the parents have the autonomy to withdraw the case. The right of a child aged 10 or older to »initiate« a question with the State Administration does not obligate the parents to participate, and cannot lead to a decision against the parents' will.<sup>18</sup> There is no review of an agreement concerning the allocation of parental authority (sole/joint), the child's residence or contact. The State Administration offers various types of services, such as counselling, mediation and supervision of contact designed to maximise settlement, participation and ensuring the child's right to two parents. The State Administration can also institute a child expert investigation.<sup>19</sup> These services are organized strictly within a family law context, and typically without the involvement of the municipal child welfare authorities. The procedures are thus to a wide extent procedurally framed by the perception of parents as autonomous individuals, and in case of concerns with the child's well-being, the procedural answer is to report to the municipal social welfare authority as described below.<sup>20</sup> To some extent child involvement is expected.



17 The contracts of Statsforvaltningen, see <http://www.statsforvaltningen.dk/site.aspx?p=8573>



18 *Forældresvarsloven* section 35.

19 *Forældresvarsloven* section 33.

20 See for instance the decision of the Central Board of Appeal of 7. February 2012, where contact between father and a 9 year old child was abrogated due to lack

However, child involvement in the case of the State Administration is accepted to take the form of asking the parents  may be a condition to the making of a decision—as opposed to the ~~strict~~ demands for direct child participation in child welfare cases, cf. below. Only if a case is not settled in the State Administration can it be submitted to court—if one of the parties asks for it.<sup>21</sup> While there is no formal obligation for the parents to participate or allowing the child to participate  the case a lack of co-operation may become decisive for the ultimate  decision, regardless of whether such decision is made by the State Administration (contact decision—temporary decisions on parental authority and residence) or the ordinary courts (parental authority and residence).<sup>22</sup>

Denmark has no general administrative appeal system for all administrative cases covering all legal topics. The State Administration's decisions can be appealed to the Division of Family Affairs of the National Appeals Board,<sup>23</sup> which is a part of the Ministry of Integration and Social Affairs. Apart from the Board's appeal function in these cases, the National Appeals Board also performs many other forms of administration and governing, such as statistical monitoring and evaluation of the administration, building of central databases, information campaigns, and it also takes  part in the preparatory legislative work and drafts the extensive guidelines  in the field of family law.<sup>24</sup>

The local State Administration was developed during the period of autocracy from 1660–1849 and has  continued also after the democratisation typically linked to the year  the constitution was enacted (1849). It has consequently remained an important feature of Danish family law. As a parallel to the court's ruling on divorce according to the Danish Code of 1683, a concession practice was developed by the King as head of the state, forming the normative basis for the above

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of cooperation from the mother, who was then reported to the municipality TFA2012.303, (FF2012.2011-7310-05174).

<sup>21</sup> *Forældreansvarsloven* section 40.

<sup>22</sup> Lack on co-operation may become decisive; see for example *Vejledning om samvær* (guidelines on contact) section 4.4.

<sup>23</sup> Ankestyrelsen 

<sup>24</sup> The power to  is contained in *Forældreansvarsloven* section 42.

mentioned legislative reforms in Danish family law in the 1920s.<sup>25</sup> The reforms maintained the parallel court and administrative system, roughly speaking providing the administration with authority in case of agreement and the court in case of a dispute. This was not implemented without critic in the legal literature maintaining that matrimonial cases were in principle a judicial matter. Yet no criticism has been heard since the 1970s.<sup>26</sup> In 1980, the government defended the state administration and it has not been challenged hereafter.<sup>27</sup> In the government's memorandum the main argument favouring the administrative system was that gathering all the cases in the ministry created uniformity, expertise and avoided the delay associated with the court system. The administrative system was characterized as easy, discrete and cheap. In these discussions, the establishment of a family court was rejected, one argument being the difficulty of qualifying the procedure as being judicial or administrative.<sup>28</sup>

The court system builds on the ordinary courts, regulated procedurally in the Procedural Act.<sup>29</sup> The court system is not specialised, and court decisions can be appealed to the high court as part of the common court system (court decisions may only be tried in full by the Supreme Court if special permission has been obtained from the Appeals Permission Board). As mentioned above, it is the general principle that court cases must be initiated by the State Administration. Only if a case is not settled, the State Administration may be requested by one of the parties to submit the case to court.<sup>30</sup> Although the court system is not

25 Andersen, E. (1956) pp. 251 ff.

26 Danielsen, S. (1989) p. 76.



27 FT 1979-80, sp 8779, see Danielsen, S (1989) p. 82.

28 Basse, E.M. (1976).

29 *Retsplejeloven nr. 1008 af 24.10.2012* Consolidated Act on Procedures with later changes (specific regulation of the family procedures in Chapter 42).

30 In contact cases the administrative authority is solely competent to decide the dispute with the possibility of administrative appeal and a limited judicial review. The competence of the court to decide contact in connection with a case on parental authority introduced in 2007 was removed again in 2012 as contact cases were considered to be unsuited for judicial decision making due to the »unlimited, detailed and changeable» nature of such cases, Legislative proposal, L157 2011/2012 with comments, pp. 15-16, Act No. 600 of 18.06.2012.

specialised, a case on custody or residence in the court system differs from other civil procedures. The judge has a greater responsibility to investigate the best interests of the child. Practically speaking, the main content of this is that the judge may initiate a child expert investigation on the child's situation and the parents' capabilities.<sup>31</sup> These child experts are private actors and have no relation to the municipalities or other state institutions. There are, however, guidelines regulating these investigations favouring the normative framework contained in the Act on Parental responsibility; the child's right to two parents. Although most counselling and mediation is offered at the administrative level, the court can also offer the parents mediation<sup>32</sup> and make use of child experts in court.<sup>33</sup>

The development in family law has changed the state's involvement in the family. In traditional marriage law, the public interest was related to the matter of status of married, unmarried or divorced as framed by the divorce case. The earlier pre-defined entities of good and bad categories such as marital status, gender and sexual orientation that delineated the distinction between state sphere and private sphere have disappeared in favour of individual rights of the family members. The change came about through a changed perception of the family members as autonomous individuals and the legal design was to go further in to the child's living circumstances upholding the child's and parent's individual rights. Thus, the balance between private and public interests have  changed in favor of the latter. And the development of individual rights—which is based on an understanding of the co-operating parent as autonomous—simultaneously narrows the individual room for autonomy. One parent has to respect the other parent's and child's right which narrows the room for care arrangements. As such, autonomy leads to increased state involvement in the welfare of the individual. This increased state interest represents the adaptation of family law to common welfare rationales and as such makes  the relation to child welfare law and the coherence of the legal framework relevant.

31 *Retsplejeloven* section 450 a-d.

32 *Retsplejeloven* chapter 27.

33 *Retsplejeloven* section 450 a.

## 4. Child welfare law and procedures in Denmark

### 4.1. *Current law and procedures*

Both decision-making and execution of services and interventions pertaining to child welfare are the responsibilities of the 98 municipalities, who are also responsible in most other areas of public, social services. The municipalities' administration in social cases is regulated in the Social Services Act and in the Act on Legal Protection and Administration in Social Matters.<sup>34</sup> The administration in social cases is strictly separated from the family law administration of the State Administration.<sup>35</sup> When informed – for instance by the State Administration – of a child potentially in need, the municipality is obliged to investigate the situation.<sup>36</sup> Recently, a range of new possibilities and obligations have been added to the legislation, i.e. expanding and emphasizing the duty of officials and others to report on children in need, to systematically register reports in the municipalities, to interview children unsupervised by the parents, to establish »children houses» for investigation of cases of abuse, and to process sensitive information between different authorities<sup>37</sup> Initiation of an investigation does not require parental consent, but this is recommended in the legal regulation. It is up to the municipality to initiate and carry out the investigation, but it can be ordered also by the National Appeals Board, if a municipality is found by the Board not to fulfill its obligations. An investigation procedure must cover a range of aspects concerning the child's situation in respect of health, relationships, school attendance<sup>38</sup> etc., and must point at whether – and which – measures should be initiated. Municipal decisions on this form of investigation and measures

34 *Lov om Retssikkerhed og Administration på det Sociale Område nr. 920 af 17.09.2012*, (Consolidated Act).

35 Based upon the principle of sector responsibility; »Sektoransvarlighedsprincippet», see for instance the report from the Danish Parliamentary Ombudsman from 2005 (FOU 2005.427) <https://www.retsinformation.dk/Forms/R0710.aspx?id=28853>

36 *Lov on social service, jf. Lovbekendtgørelse nr. 1093 af 05.09.2013* (Consolidated act on social services) section 50.

37 *Lov nr 628 af 11.06.2010 (Barnets reform) og Lov nr. 496 af 21.05.2013 om ændring af lov om social service. (Beskyttelse af børn og unge mod overgreb m.v).*

38 *Lov nr. 1442 af 22.12.2004 (Anbringelsesreformen).*

can be appealed to the National Appeals Board. Individual, need-based measures are initiated by the municipality, who can also be ordered by the National Appeals Board to initiate these. In general, to offer services, parental consent is required from *both* custodial parents, notwithstanding residency of the child. For some measures, a lack of parental consent means that they cannot be ordered at all, such as family treatment. Other measures can be issued by the municipalities without parental consent, such as assignment of a personal counsellor for a young person, and treatment, for example psychological of the young person if he or she consents.<sup>39</sup> The municipality is competent also in the case of out of home placement and contact if the parental custodian(s) and the young person above the age of 15 consents. Decisions of a coercive nature, i.e., out-of-home placement, extension of placement and restrictions in access and contact, can be initiated without the consent of the parent(s) or the 15 year old. Such decisions are initiated by the municipality, but must be endorsed by special children and young persons' committees. These committees are on the one hand located on the municipalities' premises and administratively served by these, and on the other they are independent entities with the participation of two local politicians, two child experts, and a judge. Their decisions can be appealed to the National Appeals Board and further on to the city court. During the last years, the range of non-consensual measures has been expanded, opening up for refusal of parents' permission to take home a child who has been placed out of home voluntarily when strong relationships have developed in the care giving environment, and for placement with a perspective of (forced) adoption. Individual, need-based measures whether with or without parental consent are executed by the municipalities, and must be accompanied by an action plan and individually supervised by the municipality every six months. Out of home placement with or without parental consent does not remove the parental authority of the parents,<sup>40</sup> but the municipality has the authority to decide on questions relating to the child during placement, such as contact, education and

39 Section 56.

40 Save for the (exceptional) situation of a forced adoption.

health, preferably in cooperation with the parents. Thus, the actual influence of the parents is limited by the placement.

#### 4.2. *The child welfare authorities—historically*

Although Denmark has had legislation on orphaned and stray children from the beginning of the 18th century,<sup>41</sup> the first Danish law on children, the Children Act, did not come into force before 1905.<sup>42</sup> The Act had been prepared by the Commission on state supervision of the upbringing of children, set up in 1893 as a response or follow-up on the child protection activities, organized by private, middle-class, religious organizations and to a certain extent in cooperation with public authorities throughout the 19<sup>th</sup> century.<sup>43</sup> These activities were directed at poor families as a response to the developing socialist movement and its attention at the conditions of the working class and its children. The aim was to save a large number of children from what was seen as immoral and depraved conditions by use of modern rational principles.<sup>44</sup> Thus, it was the view that the state should take over more responsibility for the upbringing of children, which could no longer be regarded as a solely private responsibility. The Act made it possible to order supervision of parents, remove parental authority, and remove »morally deprived», abused and neglected children from the home. Particularly children of single, unmarried mothers were targeted. Decisions could not be left with the local authorities, due to the low educational level and questionable interests of these.<sup>45</sup> Therefore, the public supervision of risky families and children were to be put into


41 The factory laws from 1873 and 1901, limiting child labor, and the legislation from 1888, entitling unmarried mothers to have their child support disbursed by the poverty authorities in case the child's father refused payment of support. Considerations of how to ensure some level of general childhood conditions also lied behind the implementation of state subvention of private health insurance societies and the—rather restrictive—regulation on poverty and on old age support in 1891–1893.

42 *Lov nr. 72 af 14. April 1905 om Behandlingen af Forbryderiske og Forsømte Barn og Unge* (Act on the Treatment of Criminal and Neglected Children and Young Persons).

43 Ebsen, F. (2012).

44 Graversen, J. & L. Sejv (1990).

45 Ploug, N. et.al.(2004).

practice by local custodian boards, independent of the municipalities, and a new central agency, the Custodian Council.<sup>46</sup> The board could refer the authority to an appointed custodian, for instance a doctor, teacher or church person, or to the one of the parents not at fault. This legal-administrative model was chosen rather than child judges or child courts, the notion being that the local boards were endowed with natural conditions for acting on the basis of personal knowledge of the relevant parents and children.<sup>47</sup> In 1933, the legislation was compiled into a comprehensive complex of social law, the precursor of the universal, tax-financed and rights-based system that was to be developed by the end of the 20<sup>th</sup> century. The custodian boards were turned into municipal sub-boards consisting of local politicians, if necessary joined by child experts supervised by a new State Inspectorate.<sup>48</sup> By the end of the 50s and the beginning of the 60s a new perception of children and parents, focusing on support, counselling and cooperation as opposed to control and on ety as opposed to the individual was incorporated in the legislation. In 1964, the provision on the public obligation to supervise children and families was no longer limited to special groups such as single, unmarried mothers or children with disabilities, but now potentially targeted all children and families in need of - or at risk of needing - support. This approach, expressed in the broad, encompassing public obligation towards children and families was upheld with the reform of 1976, tightly connected to the reform and reduction of the municipalities that entered into force in 1970. The holistic approach entailed substantive changes in the perception of services: The public custodian became a personal consultant; voluntary measures were to be preferred, parental orders were no longer sanctioned, and non-consensual measures were referred to the social municipal board, dealing also with other social matters. However, this optimistic, holistic view on the role of the welfare authorities came to be criticized legally, and in 1982 the Act was amended, so that the social board was supplemented by a judge and a child expert in cases of upholding a non-consensual out-

46 Værgerådet.

47 Bryderup, I (2005) p. 41.

48 Folketingets forhandlingar FT. Tillæg A 33 sp. 890 (Parliamentary proceedings).



of-home placement for more than one year, and in case of preliminary decisions. In 1984, such procedural demands were placed also on decisions of discontinued contact. Even though the regional counties were intended to support municipal decision-making, a stronger legal focus was deemed appropriate to counter local considerations. From 1989 the central regulation of the municipalities' organization was softened, and a new construction of legal authority in child protection came into being. Although it was originally intended to cover the municipal tasks in relation to children and families in general, it was later delimited to non-consensual decisions on investigations, out-of-home-placement and contact. This regulation was changed in 1994, following the work of a commission<sup>49</sup> that had been established to point at solutions to procedurally strike the balance between family service and child protection in local decision-making and between local policies, state regulation and the role of the judicial system. The amendments, which were also influenced by the Danish ratification of the CRC, led to the existing children and young persons' committee.

This legal construction of child welfare authorities mediates between the purpose-rational basis of lay municipal administration and the legal-rational basis of state regulation, and between family service and child protection. The relations between these positions are dynamic, and during the last decades a large amount of reforms have led to various changes, aiming at more unified organizational structures and political accountability by stipulating obligatory procedures and substantial criteria. Particularly, a focus on reporting and monitoring measures has been seen through obligations of the municipalities to report to central databases and statistics and to implement various digital techniques. Furthermore, information campaigns have been launched on the possibility to report to the National Appeals Board if the municipality fails to fulfil its obligations for instance by not undertaking the necessary investigations or failing to prepare action plans, to conduct consultations or to take into account the best interests of the child when making a decision on the choice of a placement facility. The National Appeals Board in these cases is authorized to revoke municipal

49 Graversen, J., & Sejr, L. (1990).

decisions. Subsequently, the construction and competence of the children and young persons' committees have been subject to changes. The municipalities have become obliged to put forward for the committee's approval not only decisions of *refusing* parents' permission to take home their children from out-of-home placement, but also municipal decisions to *give* home children from out-of-home placement. Furthermore, a new amendment expands the committee's competence in questions of placement and contact where a case has involved abuse.<sup>50</sup> The changes thus include on the one hand a decrease of the traditional high degree of autonomy of the Danish municipal administration, which has been seen as leaving a (too) considerable room for local differences. On the other hand, the authority to make decisions, and to be the gatekeeper of access to the children and young persons' committees, and thus to the courts, still rest with the municipalities, who are seen as effective and cheap as opposed to state administration, and the range of measures available to the municipalities without parental consent has broadened. As such the public interest in children, families and parenthood has increased rather dramatically.

These changes of child welfare law and authorities have in the literature on comparative welfare systems been seen as a movement towards a more child-orientated view, from lay to expert administration, and from local politics to general regulation.<sup>51</sup> It has been described as a general move of national systems during the last decade from being either child protection or family service oriented towards a more broad child welfare perspective, building on both child protection (for instance state-based judicial procedures and review) and family service (local consulting services etc.) at the same time—in the form of child development. The third approach—the child development or welfare perspective—is a holistic perspective, integrating both child protection and family service and potentially targeting all children. It incorporates the child's rights to two parents and the child's right to welfare. Thus, the third approach emphasizes the public interest in promoting the development of the child, and as such it is—like the changes in family law—adaptive and

50 Lov nr. 496 af 21. 05.2013 om ændring af lov om social service.

51 Gilbert, N. (2012).

interdependent in relation to the individualization of the family. The dynamic relation between state and municipality forms part of this growing public interest in that it represents a more direct relationship between state and child and a more ambitious welfare agenda, where the family becomes a less private unit and parenthood a less private task. The approach can be related to many factors—the emergence of new theoretical perspectives on children,<sup>52</sup> new welfare dynamics and technologies, changes of power structures, and the development of the competitive state, moving from objectives of social protection against vagaries of the market economy toward social activation and inclusion, which seek to enable citizens to be responsible and productive human capital. In Denmark, the changes in welfare law have been driven particularly by an overwhelming amount of media-exposed cases of gross child abuse and neglect, an internationally oriented focus on child protection, and competitive demands on society towards the upbringing of children.

## 5. The changes in family law and child welfare law and authorities – coherence and the private/public divide in Denmark

The change in the balance of private and public interests as mirrored in both private and public law is radical. Family law is now designed to uphold general, individual rights, and child welfare law is designed to address needs of potentially all children. Both fields have ambitiously gone beyond the family as a legal category. As such the development within both legal fields can be seen as adapting to general societal developments of individualized perceptions of family, parenthood and children. This development has turned child welfare into substantive law in both legal fields,<sup>53</sup> and as such the development represents a general and more thorough legal engagement with the child. Whereas the development could have been expected to establish a connection

<sup>52</sup> Warming, H. (2011).

<sup>53</sup> Forældreansvarsløven section 4 and Serviceløven section 19.

between law as well as authorities in the two fields, this has not been the case. In a way both systems have adapted to the individualization – but more or less independently.

Thus, the child welfare administration is still rather strictly separated from the State Administration, and earlier conceptualizations—such as family service, child protection and parental authority—are kept in the respective institutional framework, while new and more common concepts—such as the child’s perspective, involvement and child development—are incrementally and differently integrated in the respective parts of the regulation. The problem being that the new concepts may indeed interfere with the earlier ones and put demands on the consistency and coherence of the regulation—and not just supplement it in the respective fields.

The demands for coherence, entailed by the development, is illustrated by the current roles of law and authorities: The family law authorities are on the one hand expected to offer advice to parents on the welfare of their children and, when necessary, to make decisions in the best interests of the child. On the other hand, the family law authorities are not exactly responsible for these decisions. These are either made by the parents themselves, or by the authorities but without the responsibility to fulfil them—this is the responsibility of the parents (and, if necessary, the child welfare authorities). And while the child welfare authorities are on the one hand legally committed to a more holistic understanding of the best interests of the child than the family law authorities, they may nonetheless find themselves bound by the private law understanding of the best interests; the child’s right to two parents, depending on the family law authority to sanction the approach. Thus, the child welfare authorities are limited in their work by the normality as defined by family law. More specifically; the child welfare authorities are obliged to respect a decision concerning joint custody and of contact made by the family law authorities (if the child is not placed out of the home) and have to work with two parents holding parental authority. They may try to make the parents agree on another arrangement or they may help one of the parents with an application to the family law authority. Both options may, however, prove to be non-productive. The parents may not be able to agree to another arrangement and/or the family law

authority might reject a renewed application. A new case may further worsen the child's circumstances due to increased conflict and therefore not be worth it. This means that the child welfare authorities may work with a family law framework of the child that they—with a more holistic understanding of the best interests of the child—do not believe is in the best interests of the child.<sup>54</sup> The problem can be further illustrated by the debate on the Danish cases leading to legislative reform of child protection law. The cases are uniformly seen as the result of lack of investigation, unsatisfying case-management, and lack of cooperation—in the municipalities. The role of the State Administration has not been touched upon by the media, audits and judicial reviews even though many of the cases also contain family law issues of custody and contact. Neither have cases of children being killed by their father during contact raised such questions. Thus, the coverage of the cases revolves around the municipalities' handling of the cases, rather than around the rationales of the two differing rationales and the interplay between them. In the relationship between the two authorities, the family law authorities may thus be understood as the most powerful institution because it operates within private law and thus has the advantage of seeing the parents as more self-dependant. Therefore, the family law authorities are in the position to follow a narrow definition of the best interests of the child, understood as the child's right to two parents and blame the parents (or the child welfare authorities) if the child is not well. One may say that the family law produces differentiated normality in society through family law decisions, leaving families who cannot live up to this family law normality to the role of clients of the public law authorities. Thus, the individualization of the family may involve that normality has a stronger impact on social welfare law than before.<sup>55</sup> Normality in family law can then be seen as representing parents who are competent as parents, and accordingly stigmatize the non-normal

54 This conflict is spelled out in TFA2013.198 (V2012.B-0057-12) where the municipality reacts to the courts referral of custody to the father by placing the children out of the home with the purpose of protection against allegations of abuse from the father.

55 See Arvidsson, M.B. (2011) who in a Swedish context describes the dilemmas that follows from the pre-understanding in social welfare law as partly based on an understanding of the family as typical and partly not-typical.

parents of child welfare – characterized by mental disorders, addiction, violence, stalking etc.

Thus, the continuing division and lack of coherence of family law and welfare law and of the workings of the respective authorities raise a number of questions. One question is how the legal order on the one hand can operate with a broad view of child development and on the other hand with a narrow definition of the best interests of the child sustaining the parents' individual rights? Another question is how a pre-understanding of parents in conflict can be combined with the requirement in child welfare law of consent from both parents in relation to measures to support the child - while on the other hand in family law similar decisions are referred to the resident parent? A third question is that of child involvement – how can the regulation be so different when it all comes down to child welfare and development?

These questions call for answers in the form of a closer alignment of the two fields, based on a common child development perspective. Not only as regards cooperation between authorities, but also as regards definition and use of concepts and delimitations. Examples of counterproductive differences are the lack of recognition of the authority of the residential parent in child welfare law, the lack of recognition of the need for supervision and investigation in family law and the lack of common principles for child involvement in the two fields.

The problems entailed by the lack of coherence have been pointed at in the last evaluation of the Danish Act on Parental Authority, where the child welfare authorities expressed the view that the act was a hindrance to child welfare work.<sup>56</sup> Parents and children find themselves lost between the private and the public law authorities. The parents are too caught in their conflict to be able to gain from the efforts of private law authorities, and the child is often not miserable enough to get help from the public law authorities.

However, not much attention has been directed towards the interaction between family law and child welfare law. In Denmark, the intersection between the two areas has only been addressed in relation to specific points of interests even though the changes in reality signi-

56 [http://www.kl.dk/ImageVault/Images/id\\_55789/scope\\_o/ImageVaultHandler.aspx](http://www.kl.dk/ImageVault/Images/id_55789/scope_o/ImageVaultHandler.aspx)

fies a move towards a more broad and general child welfare perspective, covering the municipal as well as the state administration. As such, the relation between the two areas of law and their different rationales are addressed, but in a blurred and incremental way. In the latest reform of the Danish Social Services Act the preparatory documents mention that municipal action plans addressing abuse should involve the State Administration (yet the State Administration is not included in the sections allowing for cross-sectorial cooperation)<sup>57</sup>. In the Parental Authority Act it has only recently been stipulated that the municipalities are the competent authorities in matters of contact during out-of-home placement.<sup>58</sup> Another incremental adaptation is that legal guidelines have recently emphasized the mandatory reporting obligation of the State Administration<sup>59</sup>, and that the State Administration may collect information from other authorities including the municipalities. There have also been initiatives to instigate cooperation and communication between the municipalities and State Administration.<sup>60</sup> These reforms and changes have been dealt with separately, and they are careful not to address the narrow interpretation of the best interest of the child in private law and the understanding of parents as mainly autonomous vis á vis the public law understanding of the parents as subjected to a more holistic understanding of the best interests of the child.

This carefulness not to touch the private-public law divide and the inconsistencies stemming from it implies a legal design more preoccupied with traditional divisions of power and positions than with an interest in the reality of the people it is aimed at. The shift from an ideal of marriage to individual rights and welfare implies that it does not make sense anymore to presuppose family harmony (as in the former marriage law). Parental authority as the private law framework of the family no longer mirrors a pre-existing societal family unit to which the best interests of the child may be attributed. Instead, it mirrors the

57 Sections 49a, 49 b, 50b.

58 Forældreansvarsloven, section 24.

59 *Vejledning nr. 9297 af 25.06.2013 om samvær*.

60 Link to last report on a project on cooperation between municipalities and State Administrations: [http://www.familiestyrelsen.dk/uploads/media/samarbejde\\_kommune\\_statsamt.pdf](http://www.familiestyrelsen.dk/uploads/media/samarbejde_kommune_statsamt.pdf)

rights of the individual child, and therefore welfare must be understood with the child as the starting point. A child as a human being - and a more vulnerable one than a grown-up - is different from marriage as a societal institution. Notwithstanding this, within family law parents are taught that it is their own responsibility to live and find harmony within the framework, created by the state. What is ignored in a private law perspective is that the individual parent may have no options of ensuring the child's welfare because of the other parents' individual rights, held up by the legal framework, and harmony may be out of reach. The best interests of the child as understood in child welfare law is more in line with the new understanding of parenthood because child welfare law is centered on a holistic investigation of the child's living circumstances, its subjective understanding of its situation, and authority to act without parental consent.

Unfortunately, the challenges seem hard to overcome. Family law as private law takes its starting point in majority norms and thus produces normality while child welfare law as public law takes its starting point in situations deviating from the norms of mainstream society – such as domestic violence, abuse, crime etc. These different rationales of the two legal fields and the authorities connected to them make it difficult to obtain a higher degree of legal coherence since the societal interest in the production of normality seems to entail subordinating child welfare law under the rationale of family law. This may also explain the media's and reviewers' focus on the doings of child welfare authorities in tragic cases while the family law authorities' responsibility is not discussed.

#### 6. *Scandinavian family law and child welfare authorities—a tentative comparison*

The distinction between public and private law authorities can be identified in all three Scandinavian countries even though the structure of the authorities is quite different in the three countries. In family law matters, the competent authority in both Sweden and Norway is the ordinary court, since the cases in Norway were moved from the State



Administration in 2004.<sup>61</sup> In Norway, the child welfare authorities generally are not integrated in the family law procedure.<sup>62</sup> The same is the case in Denmark.<sup>63</sup> In Sweden, however, the family law procedure of the court involves the municipalities in that they have the authority to act in family law conflicts in different manners, they are responsible for investigation of some cases, they may initiate a family law procedure and they have to approve on some family law agreements between the parents.<sup>64</sup>

As for child welfare cases, these were in Norway moved from the municipalities<sup>65</sup> to regional state administrative authorities<sup>66</sup> in 2004.<sup>67</sup> In Sweden,<sup>68</sup> child welfare is still—like in Denmark—the responsibility of the municipalities, but conflicts are decided by ordinary courts and administrative courts, whereas the Danish model is more of an administrative nature.

These different approaches can to a large extend be explained historically. Denmark has the greatest legacy to the former autocracy which explains the authority of the State Administration in family law matters. In child welfare matters, Norway has chosen a State model<sup>69</sup> that deviates from the Danish and Swedish way of addressing critique of municipal child welfare authority. Namely by amending the legal framework and increase state coordination and monitoring. One explanation for this might be that neither Sweden nor Denmark has en bloc implemented the CRC, as opposed to Norway's full implementation. The Norwegian strategy of state administration in child welfare as well as family law can be understood as the result of a more direct state commitment to compliance with the CRC, i.e. an unwillingness to let compliance be dependent on local or administrative authorities, adhering also to differing, local or administrative rationales.

61 Dyring, J. (forthcoming) (unpublished phd. thesis p. 209).

62 See a critical view; Breivik, F.L. and K. Mevik (2012).

63 See a critical view; Kronborg, A. (2011).

64 Schiratzki, J. (2010) p. 18.

65 »Fylkeskommunerne».

66 »Fylkesnemnda».

67 Ot.prp.nr. 9 (2002–2003), cf. Lindboe (2011) p. 17.

68 Mattsson, T. (2010).

69 Lindboe, K. (2011).

The different approaches have implications for the division of private and public law. As for the public /private law divide, the Norwegian court procedure of family law seem to be rather sharply **delimited** from the child welfare proceedings of the regional state administrations. This resembles the strict divide between the Danish State Administration of family law and the Danish municipal child welfare administration. The division between public family law and child welfare law in Norway is thus described as radical in recent literature similar to Danish law<sup>70</sup>. In Sweden, however, the division seem to be more soft-in that the municipalities interact more directly with the family law court procedure. Thus, the divide seems to be most profound in Norway and Denmark and smallest in Sweden at least on the legislative level but this may look different on a case level.

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The divide is touched upon in later reforms in the Scandinavian countries. In Norwegian law a recent reform has addressed the interplay between family law and child welfare law.<sup>71</sup> Contact may be conditioned by different types of supervision by the public law authorities and they are allowed to exchange information with the private law authorities (the court). In Sweden, the thorough report delivered in 2009<sup>72</sup> by the commission assigned to draft new child welfare regulation recommended to holistically re-think the legislative complex from a child welfare (and user-oriented) perspective and thus softening the public/private law divide. It has, however, only led to minor changes.

## 7. *The Convention on the Rights of the Child*

The CRC committee has not critically addressed our specific focus in Denmark but has been understood as a matter of coordination. In the concluding observations on Denmark from 2005, the interplay between the national authorities and the municipalities is mentioned. The evaluation from 2005 states:

70 See footnote 62.

71 Lov 2013-06-21 nr. 62: Lov om endringer i barnelova.

72 *Barnskyddsutredningen*. (2009). *Lag om stöd och skydd för barn och unga* (LBU).

### Coordination

11. The Committee welcomes the establishment of the Ministry of Families and Consumer Affairs charged with the task to coordinate the implementation of the Convention and notes the role of the ad-hoc inter-ministerial committees for thematic coordination and the fact that municipalities have to develop in the course of 2006 coherent child policies.

However, the Committee is concerned that it is still unclear how a comprehensive coordination at the national and between the national and local level will be established.

12. The Committee recommends that the State party strengthen the ability of the Ministry of Family and Consumer Affairs to effectively coordinate all policies of the State party to ensure a comprehensive and effective implementation of the Convention throughout the country.

In the next evaluation from 2011 a follow up on coordination was seen as unsatisfying. The perception of the institutional framework is not basically questioned at the international level. The committee's comments can be said to illustrate the hesitation of the committee to engage in the institutional framework of the jurisdictions by avoiding to address the issue of separation of state administration and municipalities and whether this is a relevant and sensible legal design from a child welfare perspective. This is easy to understand if we look at the general history of law. In the period where legal philosophy was focused on the creation of the national states and the rights of the citizens ensured by the specific national order, the political community and the citizen's rights were part of the same story: »A traditional political order, based on a specific community, generates inalienable rights, long-term commitments and obligations that bind together the participants of a community.«<sup>73</sup> The human rights agenda in the 20th century focuses not on the citizen but on the human being, and does not have a political order similar to that of natural law, due to the lack of a global political community and community-based institutions. As such, institutions

73 Baumann, Z. (2001) cited by Banakar (2013)

are of a traditional, national character, and must be presupposed rather than addressed by the human rights agenda.

By taking the coordination approach the committee can presuppose the existing national institutions and thus embrace the national political order and authorities, and at the same time endorse the broader global human rights agenda. This hesitant approach however may just reproduce the tensions between family law and child welfare law on the agency level in the member states. In the human right discourse, tensions may be hidden in the reflection of the international society which is one in progress. The ratio is that in the future, the national authorities will act together to serve the best interests of the child. This is an easy way of course to focus on the distance in time and focus on a future where the national authorities act together to serve the best interests of the child.<sup>74</sup> Thus, the interplay is understood as a principle more than practice. The institutional construction of CRC suits this understanding since the committee's critic of the nation points to future national development. Furthermore, the generalized critic does not sound politically serious and may not be something that the state needs to act on immediately.

74 On rationality at a distance in time and space, see Brunsson, N. (2002) p. 197 ff.

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